

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D30638
W/kmb

_____AD3d_____

Argued - March 4, 2011

WILLIAM F. MASTRO, J.P.
PETER B. SKELOS
RUTH C. BALKIN
SHERI S. ROMAN, JJ.

2009-11209
2009-11613

DECISION & ORDER

Fortune Mizrachi, respondent, v Danny Mizrachi,
appellant.

(Index No. 33714/05)

Andrew Citron, New York, N.Y., for appellant.

Harvey S. Jacobs, Brooklyn, N.Y., for respondent.

In an action for a divorce and ancillary relief, the defendant appeals (1), as limited by his brief, from so much of an order of the Supreme Court, Kings County (Prus, J.), dated September 11, 2009, as, upon a decision of the same court dated July 9, 2009, made after a nonjury trial, equitably distributed the marital residence to the plaintiff, awarded custody of the parties' children to the plaintiff, directed him to pay child support in the amount of \$157 per week commencing with entry of judgment and to continue to pay the amount of child support directed in a pendente lite order of the same court dated June 16, 2006, until entry of judgment, and (2) from an order of the same court dated November 10, 2009, which granted the plaintiff's motion to confirm the report of a Judicial Hearing Officer (Harkavy, J.H.O.), dated October 23, 2009, made after a hearing, finding that he willfully violated the order dated June 16, 2006, and held him in civil contempt.

ORDERED that on the Court's own motion, the notice of appeal from the order dated September 11, 2009, is treated as an application for leave to appeal, and leave to appeal is granted (see CPLR 5701[c]); and it is further,

ORDERED that the order dated September 11, 2009, is affirmed insofar as appealed from; and it is further,

March 29, 2011

MIZRACHI v MIZRACHI

Page 1.

ORDERED that the order dated November 10, 2009, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the plaintiff.

The Supreme Court did not improvidently exercise its discretion in distributing the marital residence to the plaintiff (*see* Domestic Relations Law § 236[B][5][d], [h]; *Pinto v Pinto*, 260 AD2d 622; *Schwartz v Schwartz*, 235 AD2d 468, 469).

An award of custody is based primarily on the best interests of the children (*see* Domestic Relations Law § 70; *Salvatore v Salvatore*, 68 AD3d 966, 966). Here, the Supreme Court did not improvidently exercise its discretion, based on its assessment of the parties' credibility, character, and temperament, in concluding that the award of custody of the children to the plaintiff was in the best interests of the children (*see Eschbach v Eschbach*, 56 NY2d 167, 171; *Friederwitzer v Friederwitzer*, 55 NY2d 89; *Salvatore v Salvatore*, 68 AD3d 966; *Bourne v Bristow*, 66 AD3d 621, 622). Inasmuch as the Supreme Court's determination has a sound and substantial basis in the record, we decline to disturb it (*see Salvatore v Salvatore*, 68 AD3d at 966-967).

After the plaintiff met her prima facie burden of establishing that the defendant failed to pay child support as ordered, the defendant failed to offer credible evidence of his inability to pay. Accordingly, he was properly held in civil contempt for his willful violation of the order of support (*see Matter of Maldonado v Maldonado*, 74 AD3d 971, 971-972; *Matter of Greene-Tyus v Tyus*, 61 AD3d 758; *Matter of Fraser v Green*, 57 AD3d 896).

The defendant's remaining contention is not properly before this Court.

MASTRO, J.P., SKELOS, BALKIN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court